GARDEN CITY NEWSDAY(N. Y.)
4 May 1980

STAT

Under Cover:

The Government Returns to Secrecy

By Townsend Hoopes

There are a number of indicators, in the wake of the Soviet invasion of Afghanistan, that the government, the Congress and the courts are impelled toward a return to greater secrecy in dealing with the public and toward a greater insistence on internal discipline within government departments and agencies.

Seizing the moment, the CIA has been seeking a total exemption from the Freedom of Information Act, under which citizens can request and obtain unclassified materials relating to operations of government departments and agencies. The CIA's efforts seem now to have been largely achieved through the collapse last week of congressional efforts to write a comprehensive code of behavior for the intelligence community that would have specified restraints.

The CIA is already amply provided with legal safeguards against the release of secret or sensitive information and proposed legislative "reforms" would not have changed that. Journalist Robert Lewis, speaking as chairman of the Freedom of Information Group of the Society of Professional Journalists before the Senate Select Committee on Intelligence, stated that the Freedom of Information Act represents an equitable balance between "secrecy and sunshine."

The blanket exemption from the this act that the CIA appears to have won would remove the agency from public accountability, and would also do severe damage to legitimate journalistic and historical research. This in turn would preclude fully informed public debate on issues of great consequence for the safety of our society.

The Snepp case appears to be a central part of this developing syndrome. Briefly, Frank W. Snepp III was a middle-ranked CIA employee who wrote a book called "Decent Interval" describing the hasty and ill-coordinated U.S. evacuation of Saigon in 1975. As a conditon of his employment by the CIA, Snepp had signed an agreement promising not to publish "any information relating to the agency," either during or after the term of his employment, without specific prior approval of the CIA. By a separate undertaking, he bound himself "not to disclose any classified information relating to the agency without proper authorization."

Snepp did not submit the manuscript for CIA review, and it was published by Random House. His rationale for evading his contractual agreement was that the manuscript contained no "classified" information—that is no secret or sensitive information—and that publication was accordingly his right under the First Amendment. The CIA sued him for breach of contract, arguing that the question of whether the information disclosed was secret was irrelevant. For purposes of the litigation, the CIA conceded that the information was not secret.

The case reached the Supreme Court, and that body's strange and abrupt handling of the case has created a firestorm of controversy and anxiety in the publishing industry. Instead of inviting formal briefs from both sides, studying these, and hearing oral argument—which is the usual procedure—the court decided the case summarily without any briefs or argument. The vote against Snepp was 6-3.

Not only did the court reaffirm Snepp's violation—his failure to submit the manuscript for review—but it argued that Snepp's employment involved "an extremely high degree of trust," and that awarding merely nominal damages for his breach was inadequate—"a hollow alternative, certain to deter no one." It therefore held that Snepp was bound by a fiduciary trust. It argued: "If the agent secures prepublication clearance, he can publish with no fear of liability. If the agent publishes unreviewed material in violation of his fiduciary and contractual obligation, the trust remedy simply requires him to disgorge the benefits of his faithlessness."

The arbitrary treatment of the case and the vehemence of the language employed in the final judgment have suggested to quite a few Washington observers that the Supreme Court was reflecting, in part, its frustration at the "faithlessness" or disloyalty of its own clerks, as revealed in the pages of the best-selling book, "The Brethren," that the court's hard line in support of greater employee discipline throughout the government was, to some extent, a visceral reaction to a perceived embarrassment in its own house.

The net result of the Snepp litigation is to narrow the First Amendment rights of present and former government employees associated with agencies handling national security information and to create severe deterrents to their readiness to test those rights.

Beyond the CIA, the decision logically fits the situations at the State and Defense Departments and a few others. But the most disturbing aspect of the Supreme Court decision is its failure to indicate any limits on the use of pre-publication review agreements. In theory, the Snepp decision opens the way for the Department of Agriculture or the Bureau of Mines to impose similar contractual obligations on their workers, which could of course serve primarily to protect such government operations against disclosures of wrongdoing or even legitimate criticism in the press.

At the same time, discriminating proponents of First Amendment rights must accept an unpleasant truth about the Snepp case. The Achilles' heel of Snepp's defense was his deliberate refusal to submit the manuscript for pre-publication review. Had he done so, and had the CIA then sought to delete material that was not secret or confidential, but merely embarrassing to the CIA, Snepp could have taken the CIA to court for having exceeded its review authority.

Such a procedure would no doubt have delayed publication and in-

CONTINUED

volved possibly expensive litigation, but it would have transformed the nature of the legal issues, and Snepp would almost certainly have prevailed in court.

I think we must accept certain realities that arise from the case. One is that the government will aggressively seek to protect what it regards as legitimate intelligence secrets.

A second is that it is neither legal nor reasonable to deny the government the right to do so.

A third reality is that, given the first two, it is difficult to deny the need for a limited but dependable review procedure, since otherwise the intelligence agency could have no assurance that employees privy to sensitive information would not make purely personal decisions about disclosing what the institution judged to be important secrets.

According to several former CIA employees who now write for a living, the review procedure does not in fact amount to a kangaroo court aimed at choking off criticism of the agency, but is limited to avoiding exposure of sensitive intelligence information, sources, and methods. They claim their new writing careers have not been impaired by the submission of their manuscripts for review.

Whether or not this is the whole truth, the fact is that Snepp sought to evade the requirement. The two lower courts as well as the Supreme Court found against him on that point. Even the dissenting opinion in the Supreme Court, written by Justice John Paul Stevens, conceded that.

Some lawyers have voiced the fear that the Snepp decision virtually reverses the Pentagon Papers decision by greatly strengthening the government's ability to impose "prior restraints" on publication.

I am not a lawyer, but I doubt if this fear is very real. The Fourth Estate occupies a strong and special position in the Constitution, one deeply rooted in history and legal precedent. Justice Potter Stewart in a different case a few years ago summed it up well. Publishing, he said, is "the only organized private business that is given explicit constitutional protection," and the primary purpose of such protection is to "create a fourth institution outside the government as an additional check on the three official branches."

For these reasons, I believe the issue of "prior restraint" will be judged differently in the case of a publisher and in the case of a government employee. The privileged position of the Fourth Estate does not extend to the government employee, but it applies to the publisher.

The late Alexander Bickel of the Yale Law School, who defended The New York Times in the Pentagon Papers case, has put the matter most clearly. The government has every right to try to protect secret information, Bickel said, but if the secret information passes into the hands of the press, then the government is essentially without recourse to prevent its publication.

The publisher, having obtained the information, has the right to publish it and need not be overly scrupulous about the character of the source or the method by which it was obtained.

The government's right to impose "prior restraint" on the press is limited to extreme cases—the publication of battle plans, or of sailing schedules in wartime that would facilitate attack by enemy submarines. The government's right to discipline its own employees is a good deal broader, but the Supreme Court's ruling in the Snepp case threatens to remove all limits on that right.

Supreme Court decisions are powerful facts. They loom over the situations they deal with, they cast shadows, they are difficult to change, and almost impossible to change quickly.

We must in all probability live with the Snepp decision for quite a while, but we must immediately make a concerted effort to limit the damaging consequences as they bear on First Amendment rights. Specifically, we must urge that pre-publication review contracts be strictly limited to sensitive agencies. And we must urge measures to prohibit unconscionable penalties for the disclosure of nonsensitive information.

President Carter, who could quickly relieve anxieties by issuing a firm executive order, has not been heard from. It is to be hoped that he will be influenced by his former attorney general, Griffin Bell, who has expressed the view that "the contractual principle in the Snepp case should be limited to those engaged in foreign intelligence and counterintelligence."

Some members of Congress are already reacting with vigor. Rep. Les Aspin (D-Wis.), an able specialist in defense and intelligence matters, said recently that the matter of secrecy agreements is "an area that cries out for legislation" to narrow the effect of the Snepp ruling.

Every American citizen has a direct stake in the outcome. □

Townsend Hoopes is president of the Association of American Publishers.